No. 96-1894

Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

JAMES A. TANFORD and JOSEPH ANTHONY URBANSKI,

Petitioners,

vs.

MYLES BRAND, in his individual and official capacities as President of Indiana University, and KENNETH R. R. GROS LOUIS, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Indiana University's 155-year tradition of inviting a local religious leader familiar with the university community to give an invocation and benediction to open and close the Commencement Ceremony on its Bloomington campus violates the Establishment Clause.

LIST OF PARTIES

James Alexander Tanford, Kimberly J. MacDonald, David Suess and Joseph Anthony Urbanski were the plaintiffs-appellants in the court below. Dr. Myles Brand, in his individual and official capacities as President of Indiana University, and Dr. Kenneth R.R. Gros Louis, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington, were the defendants-appellees.

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STATEMENT OF THE CASE

The Seventh Circuit affirmed the district court's ruling that inclusion of a brief, nonsectarian invocation and benediction during Indiana University's Commencement Ceremony on its Bloomington campus does not violate the Establishment Clause of U.S. Const. amend. I. The following facts are established by uncontroverted summary judgment evidence. Pursuant to Sup. Ct. Rule 15.2, misstatements of facts in the petition for writ of certiorari ("Petition") are also noted.

A. Commencement Activities And Commencement Ceremony.

Commencement on Indiana University's Bloomington campus consists of a wide range of activities, which begin on Friday afternoon with the Senior Class Tree Dedication and Graduation Send-Off at the President's Home. This is followed by other activities in the afternoon and evening, including special events by various schools for graduates and their families. On Saturday the activities continue with a University-wide Commencement Ceremony in Memorial Stadium (the football stadium) during the morning, followed by special events throughout the day by other schools for graduates and families. There are also a variety of public displays and exhibits throughout the three-day weekend.

Approximately 30,000 to 35,000 people attend the Saturday morning Commencement Ceremony. All graduating students are invited to this University-wide ceremony in the football stadium. However, attendance is voluntary, and there is no penalty of any sort for students who chose not to attend. Of approximately 7,400 graduating students in undergraduate and graduate schools, the University estimates that about 5,000 attend.

The Commencement Ceremony begins with an academic procession of approximately 5,000 graduating students and 150 university officials and faculty members. The students and faculty are then seated on chairs placed on the football field. The 25,000 to 30,000 visitors and guests are seated in the permanent football stadium seats. The ceremony consists of the national anthem, an invocation, an address by the commencement speaker,[1] the conferral of honorary degrees, the presentation of the class, student remarks, the charge to the graduating class, the conferral of degrees, the induction ceremony, the singing of "Hail to Old IU," and a benediction.[2]

As part of the Commencement activities, the School of Law conducts a Recognition Ceremony for its graduates and their families and friends on Saturday afternoon in the Indiana University Auditorium. This annual ceremony is much smaller than the University-wide ceremony and gives the law school an opportunity to recognize each of its graduates individually on the stage of the auditorium. In 1995 the law graduates were addressed by Attorney General Janet Reno. The law school also hosts a School of Law Luncheon for its graduating students and their families. These law school functions do not have an invocation or benediction. Historically, 15% to 55% of the students graduating from the law school have attended the University-wide Commencement Ceremony (as opposed to the separate law school ceremony).

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[1] In 1995, the commencement speaker was former United States Senator Birch Bayh.

[2] If the weather is adverse, the Commencement Ceremony may be held in two sessions in Assembly Hall (the basketball fieldhouse), with graduates and faculty seated on chairs on the basketball floor and guests in the permanent fieldhouse seats.

B. The Invocation And Benediction.

The University's tradition of an invocation and benediction to open and close the Commencement Ceremony has been established since at least 1840—a tradition spanning one hundred and fifty-five years of University history. A religious leader from the Bloomington community is invited to give the invocation and benediction. The person is selected from those actively involved in the university community and familiar with the diversity of the campus. A different person is chosen each year so that invitations rotate in the local community. The person is invited to give an invocation and benediction which are uplifting and unifying to fit the occasion.

In 1995, the Reverend Robert Sims of the St. Paul Catholic Center delivered the invocation and benediction at the Commencement Ceremony. St. Paul is a parish in Bloomington which serves university students. In 1994, the invocation and benediction were given by Reverend Barbara Carlson of the Unitarian Universalist Church in Bloomington.[3] Over the previous five years, the invocation and benediction were delivered by Rev. Cynthia Cochran Carney, First Presbyterian Church; Rev. Philip

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[3] The text of Reverend Sims' benediction at the 1995 Commencement Ceremony is quoted in the Petition at 5. The text of Reverend Carlson's 1994 benediction was:

> Before we rush out of this place, floating, climbing, dancing, we pause again in reverence before the holy.
>
> Aware that this ceremony has been a door that opens, yet closes, too; a passage in time.
>
> Take what you have learned.
>
> And add to it; the truest knowledge grows.
>
> Give thanks and turn yourself with courage toward the future.
>
> Go and live.
>
> And may life's deepest meanings attend you. Amen.

Amerson, First United Methodist Church; Rev. Ross Marrs, First United Methodist Church; and Rabbi Susan Shifron, B' Nai B'Rith Hillel Foundation.[4]

The University's purpose and intent in continuing the 155-year tradition on its Bloomington campus is not to sponsor or establish any particular religious faith or to endorse religion in general. Rather, the University believes that inclusion of a nonsectarian invocation and benediction to open and close the Commencement Ceremony serves significant secular objectives. The invocation and benediction serve to emphasize the solemnity and dignity of the larger ceremony of which they are a small part. In addition, inclusion of the invocation and benediction continues a tradition on a campus that cherishes both the physical structures and the traditions that it has inherited from the preceding century. By participating in the tradition, students and others are given a sense of belonging to something that transcends the present moment.

C. The Petitioners.

Petitioner Tanford is a full professor with tenure at the University. He has taught at the School of Law since 1979 and is currently the John Hastings Faculty Fellow.

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[4] The Petition states (at 3) that "[n]o one from outside the Judeo-Christian tradition has ever been invited" to give the invocation and benediction. There is no such evidence of record. The record does show that when a "mosque" was built in Bloomington, the University inquired whether anyone there was interested in participating. The Petition's statements (at 6) as to the "only" persons invited "[u]ntil a few years ago" and changes "within the last ten years" are not only unsupported but also affirmatively contradicted by the record. The Petition's statement (at 3) that "instructions" are given is petitioners' characterization of the University's request that the invocation and benediction be uplifting and unifying.

The Petition erroneously states (at 2) that Professor Tanford's "attendance at graduation is not voluntary," and wrongly claims (at 7) that the Seventh Circuit erroneously stated the facts because Tanford is "not free to skip the morning ceremony . . . ." The uncontroverted evidence established that law school faculty members are asked by an Assistant Dean to volunteer to attend the Commencement Ceremony and "hood" students. One member of the law school faculty has never volunteered. Attending the Ceremony and "hooding" students is not required and is not considered to be part of a professor's service to the University.

At his deposition, Tanford acknowledged that what he described as an "obligation" is not backed by discipline if he chooses not to attend the Commencement Ceremony. He also acknowledged that the Assistant Dean has no real power over his career. Moreover, when Tanford declined to attend on a previous occasion, as a matter principle because of the invocation and benediction, the Assistant Dean respected that decision. Tanford did not even bother to ask anyone else, such as the Dean of the law school or the President of the University, whether a decision to decline as a matter of conscience would have any effect on his career. Tanford testified that he does not believe "that anyone in the university would retaliate against me for a single incident . . . There is a tremendous amount of tolerance for eccentric people in the university."[5]

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[5] The Petition also states (at 8) that Professor Tanford's "attendance was not voluntary, but was 'part of [his] duties at the law school,'" quoting 883 F. Supp. at 1235. The Petition, however, is quoting the district court's preliminary injunction decision, not its final decision. Moreover, even that quotation from the preliminary injunction decision omits the district court's notation that "no explicit requirement is imposed on faculty to attend the commencement ceremony and no sanction flows from a failure to volunteer for such service." Pet. App. a-32 n.2.

The Petition states (at 2) that Tanford objects "to nondenominational public prayer on religious grounds, believing them to trivialize and desanctify communication with his god." At his deposition, Tanford said he was not sure he could articulate the precise reasons why he was offended by the invocation and benediction. He further testified that (1) "the religious side of me finds this kind of watered down nonsectarian civic religion Judeo-Christian tradition prayer offensive"; (2) "on the other hand I think it is too religious"; and (3) in a "somewhat trivial sense" it is catering to the "religious right." Tanford said he believed that everyone participated in the invocation and benediction simply by being there, but admitted that "I don't think that because 7,000 people stood, I don't believe for a minute that all 7,000 people believed in the religious message," and that "I am certain there are a lot of people who did not intend by remaining to express agreement with the message." On the question of whether the invocation and benediction would affect people's religious beliefs, he responded in part: "Taken in isolation, obviously not. I cannot imagine that a single one minute watered down prayer is going to change anyone's mind on religion." He thinks, however, that some people are "affected by the cumulative experience of little things like this."

Tanford testified that in 1987, the one occasion in 15 years before his lawsuit when he did attend the Commencement Ceremony, he went because he was asked to "hood" students. During that 1987 Ceremony, Tanford absented himself when the invocation began, returned for the "hooding," and left again before the benediction. He said he left before the benediction in 1987 in part "hoping that people would ask me later why I had done it and that I then could . . . engage them in a dialogue to explain my reasons." After attending the Commencement Ceremony in 1987, Tanford

wrote a letter to the editor of the student newspaper "urging the university community generally, the faculty particularly, to boycott graduation on the grounds of the inappropriateness of having prayer."

Petitioner Urbanski is an undergraduate student who entered the University after the district court's preliminary injunction decision and was later added as a plaintiff. He testified that he joined the lawsuit after reading a pamphlet "looking for people to get involved with a lawsuit against the university" and contacting Tanford.

Urbanski is a computer science major, with a possible double major in cognitive science. He testified that, as a college student, he is much more independent than in high school and is being challenged by ideas more than in high school. The college experience is attractive to him because of the critical thinking and the diversity of beliefs on a college campus. He said "it's refreshing to see, you know, different people, different countries, different belief systems, even sexual orientations . . . ."

Urbanski testified that he opposes prayer because he believes there should be a separation between church and state in a public institution. He considers it a political issue and also a personal issue because prayer makes him uncomfortable. He wants the school in a way to reflect his beliefs which are atheistic. However, he agrees with the policy of his public high school, which allows students during their commencement speeches to have a moment of silence or a short prayer if they choose.

Urbanski said he would go to his Commencement Ceremony in 1999 and elect to stay during an invocation and benediction, because it is an inconvenience to leave during parts of the ceremony. He would do what he usually does when he is in a group of people and there is a prayer: "I would just sit there quietly until it was over." He

testified he would not participate in the prayer and knows there would be other people in the stadium who would be doing the same thing—sitting quietly and not participating. He said he could listen without any impact on his beliefs.[6]

D. Available Accommodation.

One of the responsibilities of Thomas Bolyard, the Director of Field Services at the Indiana University Alumni Association in Bloomington, is to accommodate persons who have special problems or requests related to the Commencement Ceremony on the Bloomington campus. Bolyard stated that it would be a relatively easy matter to accommodate Professor Tanford and others who wish to be seated in a way that they may inconspicuously enter and exit the Commencement Ceremony. He further stated that some students and faculty always arrive late and leave early; that it is common for students and faculty to "get up and 'mill around' for various reasons" during the ceremony; and that students and faculty frequently leave their seats to get a drink or to use the restrooms.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit Considered And Correctly Applied *Lemon*.

The Petition argues (at 9-13) that the Seventh Circuit "ignored" and "fail[ed] to apply" the test of *Lemon v. Kurtzman*, 403

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[6] The Petition states (at 7) that the Seventh Circuit erred as to Urbanski in stating that "plaintiffs could simply attend the afternoon ceremonies," because "Urbanski is an undergraduate, and the afternoon ceremony was for law students only." There is, however, no evidence that Urbanski will be unable to attend a ceremony or activity held by his own school for its graduating students (or that such ceremony or activity would include an invocation or benediction).

U.S. 602 (1971). This is untenable on the face of the Seventh Circuit's opinion. The court repeatedly referenced *Lemon*. Pet. App. a-6, a-7, a-9. The court expressly ruled that "the invocation and benediction serve legitimate secular purposes" (the first part of the *Lemon* test). *Id.* at a-9. The court expressly stated that it agreed with the district court's analysis of the "effect" and "entanglement" parts of the *Lemon* test. *Id.* at a-10; *see id.* at a-24 to a-28.

It is equally clear that the decision below is correct on these issues. The first, "secular purpose," part of the *Lemon* test focuses on the government's intent or motive for the challenged action. *"Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting *with the intent* of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (emphasis added). However, the government's purpose need not be "'exclusively secular.'" *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984). Rather, a challenged action is invalid on this ground only if the government was "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. *Accord, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Stated differently, *Lemon's* purpose test "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' . . . and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335 (citation omitted).

The uncontroverted evidence established that Indiana University's purpose is *not* to sponsor any particular religion, or to endorse religion in general. Rather, its purposes for the invocation

and benediction are to solemnize the Commencement Ceremony and continue the University's 155-year tradition. These are legitimate secular purposes.

> [S]uch governmental "acknowledgements" of religion as legislative prayers . . ., government declaration of Thanksgiving as a public holiday, printing "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court" . . . serve . . . the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.

Lynch, 465 U.S. at 692-93 (O'Conner, J., concurring). In the context of a university's graduation ceremony, a brief and nonsectarian invocation and benediction are merely another type of such "ceremonial deism," which does not violate the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989); *id.* at 596 n.46 (plurality opinion); *id.* at 630 (O'Conner, J., concurring in part and in judgment); *Engle v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Other examples include Presidential Proclamations calling for prayer, *Lynch*, 465 U.S. at 675-76 & nn.2-3; prayer at Presidential inaugurations, *County of Allegheny*, 492 U.S. at 671-72 n.9 (Kennedy, J., concurring in judgment in part and dissenting in part); and federal statutes providing for a "National Day of Prayer," *Lynch*, 465 U.S. at 677, for the words "under God" in the Pledge of Allegiance, *Wallace*, 472 U.S. at 78 n.5 (O'Conner, J., concurring in judgment), and for the words "In God is our Trust" in the National Anthem, *Engle*, 370 U.S. at 449 (Stewart, J., dissenting).

The second *Lemon* factor—whether the primary effect of the challenged action is to advance or inhibit religion—is to be applied in a practical and realistic manner. The issue is not whether there is any remote or incidental "advancement." As this Court has said, its "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683. *See also, e.g., Bowen*, 487 U.S. at 607.

In *Lynch*, the Court held that a city's inclusion of a nativity scene in its Christmas display did not impermissibly "advance" religion under the *Lemon* test:

> [T]o conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, . . . expenditure of public funds for transportation of students to church-sponsored schools, . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, . . . noncategorical grants to church-sponsored colleges and universities, . . . and . . . tax exemptions for church properties . . . . It would also require that we view it as more of an endorsement of religion than . . . Sunday Closing Laws[,] . . . [a] release time program for religious training[,] . . . and . . . legislative prayers . . . .
>
> We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause.

465 U.S. at 681-82 (citations and footnotes omitted).

The same is true of the invocation and benediction here. It is not reasonable to contend that these few moments during a once-a-year event, at a major university devoted to scholarship, criticism and free-ranging pursuit of all sorts of ideas, have a greater effect in "advancing" religion than the types of governmental actions surveyed in the above-quoted passage. As in *Lynch*, "whatever benefit" the invocation and benediction may be to one faith or to all religions is at most "indirect, remote, and incidental." *Id.* at 683.

The third *Lemon* factor, whether the challenged action creates "excessive entanglement" between church and state, is not a serious issue. The University's role is limited to inviting a member of the clergy on a rotating basis—from among those who are familiar with the University and its diverse community—and expressing the desire that the message be uplifting and unifying. As in *Lynch*, "[t]here is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon* . . . ." 465 U.S. at 684. *See also, e.g., Mueller v. Allen*, 463 U.S. 388, 403 (1983) (government monitoring of books and instructional materials for religious content to determine eligibility for tax deduction does not constitute excessive entanglement); *Bowen*, 487 U.S. at 616-17 (similar—grant monitoring); *Agostini v. Felton*, ___ U.S. ___, 1997 WL 338583 at *19-20 (1997) ("administrative cooperation" between public officials and parochial schools, and "monthly visits of public supervisors," does not create excessive entanglement).

II. The Seventh Circuit Properly Considered *Marsh* And *Lee*.

The Petition argues (at 13-16, 25-27) that the Seventh Circuit erred in "app[lying]" *Marsh v. Chambers*, 463 U.S. 783 (1983), and

that its decision "is not consistent" with *Lee v. Weisman*, 505 U.S. 577 (1992). These arguments misconstrue both the Seventh Circuit's decision and those Supreme Court precedents.

As an initial matter, the Seventh Circuit properly considered both *Lee* and *Marsh* in resolving this case. In their Brief of Appellants (at 12), the petitioners explicitly represented to the Seventh Circuit that "it would not be improper to view the decision in this case as turning on . . . whether [the facts here are] more like the graduation prayer in *Lee* or the legislative prayer in *Marsh*." Moreover, the court necessarily had to consider whether there was "coercion" under the standards of *Lee*.

Petitioners repeatedly misconstrue the decision in *Lee*. For example, they say (Pet. at 19) that *Lee's* discussion of the role of the school principal in "direct[ing] and controll[ing] the content of the prayers" shows there is "excessive entanglement" here. *Lee*, however, was not addressing "entanglement" and, indeed, did not apply the *Lemon* test at all. 505 U.S. at 586-87. Rather, the majority in *Lee* concluded that the role of the school officials contributed to the *coercive* effect of graduation prayers in the secondary school context, as those officials' "effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject." *Id.* at 590.

More generally, in finding that the graduation prayer in *Lee* violated the Establishment Clause, Justice Kennedy's opinion for the Court focused squarely on coercion, and rested on a detailed analysis of the secondary school setting, the immaturity of adolescents, and the peer, public and school official pressures to which young persons of that age and in that context are subjected. *Id.* at 592-98. In addition to the role of the school official in the prayer, those officials' "supervision and control" of the graduation ceremony itself "place[d]

public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain a respectful silence . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593. Hence, the Court concluded, a "reasonable" high school student "in this milieu could believe that the group exercise *signified her own participation or approval of it.*" *Id.* (emphasis added). Given her reasonable belief in this context that she was signifying participation or approval, the student was put "in the dilemma of participating . . . or protesting." *Id.* The Court reasoned that "primary and secondary school children" could not constitutionally be placed "in this position," emphasizing the force of peer pressure among "adolescents" which made protest an unrealistic alternative. *Id.* at 593-94. Finally, although attendance at graduation was not required in *Lee*, the student did not have "a real choice" to avoid the dilemma because "in our society and in our culture high school graduation is one of life's most significant occasions," and thus "a student is not free to absent herself from the graduation exercise in any real sense of the word 'voluntary' . . . ." *Id.* at 595.

As the district court held (Pet. App. a-18 to a-24) and the Seventh Circuit affirmed (*id.* at a-7 to a-9), none of the factors creating impermissible coercion in *Lee*, let alone all of them, are present in the university context here. The plaintiffs' own testimony established that they did not believe that standing or remaining silent "signified . . . participation or approval" of the prayer. Nor could they "reasonably" believe the contrary. The Commencement Ceremony is in a stadium with tens of thousands of people who are members of a truly international university community, drawn from all manner of backgrounds, ethnic groups, religions and non-religions. No reasonably objective person could draw any conclusion about the participation or approval of someone who simply stands and remains

silent during an invocation and benediction that open and close the ceremony.

Similarly, the plaintiffs' own testimony established that they are not like the adolescent student in *Lee*, for whom social convention and peer pressure made "protest" an unacceptable alternative. Nor would a contrary conclusion be reasonable. Moreover, a person who chooses to remain seated during the invocation and benediction would scarcely be noticed, let alone cause a stir, in a football stadium filled with thousands of people. Alternatively, a "protestor" can be accommodated if he or she wishes to avoid these parts of the ceremony altogether.[7]

The Petition (at 22-24) also errs in claiming that the Seventh Circuit's "*de minimus*" statement contravenes *Lee*. The Seventh Circuit's statement was addressing the "effect" part of the *Lemon* test. *See* Pet. App. a-10. As noted above, this Court has repeatedly held under that test that "indirect, remote, and incidental" advancement effects do not violate the Establishment Clause. *Lee*, by contrast, was not applying the *Lemon* test but rather a coercion analysis. And even in that context, the Court emphasized that the issue "is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." 505 U.S. at 598. *Lee* also reiterated that:

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[7] There are, of course, many other differences as well. For example, the University-wide graduation ceremony does not have the same social importance creating compulsion to attend, and approximately one-third of all graduates choose not to do so.

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is true of course that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id., *quoting School Dist. of Abington v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

Petitioners also err in repeatedly proclaiming "circuit conflicts" based on decisions involving prayer in primary and secondary schools. Pet. at 12-13, 15-16, 18, 21-22, 24, 26-27. As both courts below held, this case, which involves a *university* ceremony, is fundamentally different.

The Supreme Court's precedents repeatedly recognize as much. In *Lee*, for example, the Court explicitly stated that its "controlling precedents" were those involving "prayer and religious exercise in primary and secondary public schools . . . ." 505 U.S. at 586. *See also, e.g., id.* at 592 (citing precedents observing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). At the same time, this Court's religion cases have repeatedly recognized the substantial difference, in impressionability and maturity, between primary and secondary students on the one hand and university students on the other. Pet. App. a-9, *quoting Widmar v. Vicent*, 454 U.S. 263, 274 n.14 (1981); Pet. App. a-20 to a-21, *quoting Tilton v. Richardson*, 403 U.S. 672, 686 (1971); *see*

also, e.g., Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987); *id.* at 607 n.7 (Powell, J., concurring); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 765 (plurality opinion) (1976).[8]

Petitioners also err with respect to *Marsh v. Chambers* (Pet. at 13-15). Initially, they are plainly wrong in contending that the Seventh Circuit "appl[ied] the 'tradition' exception" of *Marsh* to the exclusion of *Lemon*. The court mentioned *Marsh* in a single sentence in the course of addressing the "secular purpose" part of the *Lemon* test. Pet. App. a-9. Moreover, the relevance of *Marsh* is not so limited as petitioners contend.

Lee extensively addressed and distinguished the legislative prayers in *Marsh* precisely on the ground of the coercive effect of prayer in the secondary school context, "in which the student was left with no alternative but to submit." 505 U.S. at 596-97. The differences "between the facts of *Marsh*" and those in *Lee* were dispositive, and the Court explicitly concluded that "[o]ur decisions in *Engle v. Vitale* . . . and *School Dist. of Abbington v. Schempp* . . . require us to distinguish the public school context [from the legislative prayers in *Marsh*]. *Id.* at 597. Moreover, other opinions have pointed to the legislative prayers in *Marsh* as one example of non-coercive ceremonial "acknowledgments" of religion which do

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[8] *Cf. Wallace*, 472 U.S. at 81 (O'Conner, J., concurring in judgment):

> At the very least, Presidential Proclamations [calling for public prayers] are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. *See, e.g., Marsh v. Chambers* . . . [and] *Tilton v. Richardson* . . . .

not violate the Establishment Clause. *E.g., County of Allegheny*, 492 U.S. at 596 n.46 (plurality opinion); *id.* at 630-31 (O'Conner, J., concurring in part and in judgment); *id.* at 662-63 (Kennedy, J., concurring in judgment in part and dissenting in part).

Finally, although petitioners would confine the legislative prayers upheld in *Marsh* to a "unique exception" based on history (Pet. at 14-15), the opinion in *Marsh* explained that the significance of "history" was the light it shed on the "*intent*" of the Framers of the First Amendment. 463 U.S. at 790 (emphasis added).

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. The Court added that "[i]n applying the First Amendment to the states through the Fourteenth Amendment, . . . it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Id.* at 790-91.

Under a coherent view of "original intent" as a mode of constitutional interpretation, it cannot be thought that the same draftsmen—who viewed prayer by government-paid clergy to begin every session day of our national legislature as consistent with the Establishment Clause—would have viewed differently a brief invocation and benediction, by unpaid clergy invited on a rotating basis, during a once-a-year mass ceremony at a State university. To the contrary, those Framers of the Establishment Clause "did not consider opening prayers as a proselytizing activity or as

symbolically placing the government's 'official seal of approval on one religious view' . . . ." *Id.* at 792 (citations omitted). Moreover, under any realistic view of the matter, the invocation and benediction here are far less problematic under the Establishment Clause than daily prayers at the heart of government in our Nation's capital.[9]

III. Petitioners' Other Contentions Are Also Wrong.

Petitioners' assertions that prayer may never be used to solemnize public occasions (Pet. at 20-22) cannot be reconciled with this Court's opinions. *See* Part I, *supra*. Petitioners' authority, *Lee*, held to the contrary only in the secondary school setting and because of the coercive effects of prayer there. By contrast, and as in the cases of legislative, presidential and other prayers, no such coercion is presented here. Indeed, the familiar "God save the United States and this Honorable Court" is an invocation and a prayer. *Engel*, 370 U.S. at 439 (Douglas, J., concurring); *Lee*, 505 U.S. at 635 (Scalia, J., dissenting). The meaningful differences between that judicial invocation and Indiana University's invocation and benediction cut the other way. The judicial invocation occurs every session day of court (rather than once a year) and in a courtroom with litigants

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[9] *Cf. County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part) (footnote omitted):

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.

present (rather than in a stadium filled with tens of thousands of people).[10]

Petitioners also err in criticizing the Seventh Circuit's consideration of the fact that the invocation and benediction are "nonsectarian" (Pet. at 16-18). While that fact alone is not dispositive of the issue—and the Seventh Circuit did not purport to say otherwise—the nonsectarian nature of a prayer, display or other reference to a deity is clearly *relevant* to whether a challenged expression violates the Establishment Clause. *See, e.g., County of Allegheny*, 492 U.S. at 602-03. Indeed, the sectarian nature of the expression (as well as other factors such as its duration and pervasiveness) were crucial to the "city seal" decisions that petitioners wrongly claim conflict with the decision here. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226, 1230-33 (10th Cir. 1995) (following *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992)); *compare, Gaylor v. United States*, 74 F.3d 214, 216-17 (10th Cir.) (federal statutes establishing "In God we trust" as the national motto and providing for its inscription on all coins and currency do not violate the Establishment Clause), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1830 (1996).

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[10] Petitioners' "solemnization" contention also apparently argues (Pet. at 21-22) a sort of "available alternative means" analysis. A majority of the Supreme Court has twice rejected such a test in Establishment Clause cases. *Lynch*, 465 U.S. at 681 n.7; *County of Allegheny*, 492 U.S. at 636-37 (O'Conner, J., concurring in part and in judgment); *id.* at 676 & n.12 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in judgment in part and dissenting in part). Indeed, none of the forms of "ceremonial deism" noted above could survive such a test, whereas this Court has "avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens . . . ." *Id.* at 623 (O'Conner, J., concurring in part and in judgment).

The nonsectarian nature of an expression is also particularly significant under the "endorsement" standard employed by Justice O'Conner, which asks whether the challenged expression communicates the government's disapproval of other religious choices. *County of Allegeny*, 492 U.S. at 631 (O'Conner, J., concurring in part and in judgment). This endorsement standard "focuses upon the perception of a reasonable, informed observer," *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2452 (1995) (O'Conner, J., concurring in part and in judgment), who "must be deemed aware of the history and context of the community and forum in which the religious display appears," *id.* at 2455. Here, such a reasonable and informed observer would be aware, *inter alia*, of the brief and nonsectarian nature of the invocation and benediction, of the University's 155-year tradition, and of the wide-ranging scholarship, criticism and advocation of all sorts of ideas in this university "community" and "forum." Such an observer would not perceive the invocation and benediction during its Commencement Ceremony to be disapproval by Indiana University of other religious choices.[11]

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[11] Petitioners' own affiant stated, *inter alia*:

> . . . Indiana University strives to provide a learning and living environment that honors and affirms the broadest diversity of religious opinions among its students, faculty and staff. My experiences with many segments of the University structure lead me to view it as operating from a truly secular or humanistic value base.
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> * * *
>
> Over 2,200 students from outside the United States are enrolled at I.U. Its faculty reflects the importation of scholars from many nations. Among this international contingent are those who hold to cultural and religious traditions, ethnics and values quite outside the scope of the Euro-American dominant cultural and religious mores found on this campus.

Affidavit of Robert E. Turner ¶¶ III, VI.

CONCLUSION

Under every standard employed by majorities of the Supreme Court, the inquiry in an Establishment Clause case is sensitive and fact-specific. Under the *Lemon* test, "[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678. Similarly under a coercion approach, the inquiry is "delicate and fact-sensitive" and "of necessity one of line-drawing . . . ." *Lee*, 505 U.S. at 597, 598. Likewise under the endorsement standard, "[e]very government practice must be judged in its unique circumstances," *Lynch*, 465 U.S. at 694 (O'Conner, J., concurring), which "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case," *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 2526 (1995) (O'Conner, J., concurring). None of these standards require "relentless and all-persuasive" efforts "to exclude religion from every aspect of public life . . . ." *Lee*, 505 U.S. at 598. *Accord, Lynch*, 465 U.S. at 673-75; *id.* at 692-93 (O'Conner, J., concurring).

Both courts below simply applied the pertinent and fact-sensitive standards to the facts presented, and both courts arrived at the same conclusion. Under any realistic view, petitioners are not "coerced to participate" in a religious exercise. There is no evidence, and it is not credibly to be believed, that Indiana University's "real" purpose or intent is to promote religion. From a reasonable and objective standpoint, which considers the history and circumstances of the Commencement Ceremony as well as the broader University context in which it occurs, the invocation and benediction are not a disapproval of other religious choices. As a practical matter, any "advancement" of religion from this small part of a once-a-year event is negligible.

The decision below conforms with the decisions of this Court, does not conflict with decisions of any other federal circuit, and does not warrant further review. The Petition should be denied.

Respectfully submitted,

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